Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BILLIE BRYAN MACKEY,
Petitioner,

v.

CLIFFORD MOSS, EARL L. LAURENCE, HAROLD ROTH and RALPH BAIN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a "heightened pleading standard" to survive a motion to dismiss based on an assertion of qualified immunity? The court below imposed a "heightened pleading standard," in conflict with decisions of the First and Seventh Circuits and contrary to this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993).

2. Whether plaintiffs in *Bivens* cases must produce, prior to discovery, "direct," as opposed to persuasive circumstantial evidence of unlawful motive? The court below imposed a direct evidence requirement, in conflict with decisions of the Fifth, Sixth, Seventh and Ninth Circuits.

PARTIES TO THE PROCEEDINGS

The following parties were defendants in the district court: Louis W. Sullivan, in his official capacity as Secretary of the Department of Health and Human Services, Clifford Moss, Earl L. Laurence, Harold Roth and Ralph Bain. The sole plaintiff was Billie Bryan Mackey. Only respondents Moss, Laurence, Roth and Bain were appellees in the court of appeals. Claims against the Secretary of the Department of Health and Human Services remain pending in the District Court.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Billie Bryan Mackey petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is not reported. The order denying rehearing is not reported. App., *infra*, 2a. The order denying petitioner's suggestion for rehearing *en banc* is not reported. App., *infra*, 3a. The July 13, 1993 order of the district court is not reported. App., *infra*, 4a. The Memorandum and Order are not reported. App., *infra*, 5a-16a. The orders of the court of appeals on the first appeal are not reported. App., *infra*, 17a-19a.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1994. A timely filed petition for rehearing was denied on June 15, 1994. App., *infra*, 3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULES INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property without due process of law."

Rule 8 Fed. R. Civ. P. provides in part that a "pleading which sets forth a claim for relief" shall contain "(2) a short and plain statement of the claim showing that the pleader is entitled to relief." App., *infra*, 20a.

Rule 9(b) Fed. R. Civ. P. provides in part that: "Malice, intent, knowledge and other condition of minds of a person may be averred generally." Rules 9(b) and 12(b) of the Fed. R. Civ. P. are set forth at App., *infra*, 20a and 21a.

INTRODUCTION AND STATEMENT OF THE CASE

This case arises from a protracted course of criminal conduct by federal supervisory officials who submitted false affidavits and manufactured false documents with the deliberate intent to obstruct Petitioner's right to a fair and impartial investigation of her complaints of blatant sex discrimination and retaliation and a prompt judicial determination of her complaints. Respondents' unlawful course of conduct resulted in a five-year delay in processing of Ms. Mackey's timely filed grievance and complaints of discrimination and retaliation during which time respondents literally destroyed Ms. Mackey's career as a senior professional employee at the National Institutes of Health ("NIH").

The clear deprivation of Petitioner's basic Fifth Amendment due process rights provides the context for this

Court to address the important and unsettled question of how to balance two competing interests: the ability of victims of constitutional violations who are federal employees to seek vindication in court and to deter future violations, and the ability of government officials to perform their functions without undue concern about potential litigation.. In conflict with other courts of appeals, the District of Columbia Circuit has imposed a "heightened pleading standard" in Section 1983 and *Bivens* cases where unlawful motive is an element.[1]

The ruling of the court of appeals means that even a long-delayed voluntary confession of constitutional wrongdoing by respondents results in dismissal of an otherwise meritorious *Bivens* action prior to discovery. Because state of mind is generally provable only through circumstantial evidence, the ruling below effectively prohibits an entire class of *Bivens* and Section 1983 claims by federal employees.

The decision below squarely conflicts with the holdings of other courts of appeals on two important and recurring issues concerning the scope of qualified immunity; it is contrary to the underpinnings of this Court's holding prohibiting judge-made "heightened pleading standards" in a related context; it imposes a pleading standard with which five Justices of the Supreme Court have disagreed. In short, this case is a nonpareil candidate for review.

1. *Background.* This case involves governmental infringement of the most basic Fifth Amendment rights to due process. Petitioner filed this *Bivens* action alleging intentional violations of her Fifth Amendment due process

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[1] The same standards of qualified immunity apply to *Bivens* and Section 1983 cases. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) ("[T]he 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression" (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

rights by NIH officials.[2] Respondents moved to dismiss the complaint or, alternatively, for summary judgment based on an assertion of qualified immunity based on Ms. Mackey's failure to meet the "heightened pleading standard." The district court, after initially agreeing to limited discovery, reversed itself and stayed all discovery.

Ms. Mackey has been employed at National Institutes of Health ("NIH") since 1966 and has enjoyed a long and distinguished professional career at that agency. By virtue of her long professional career at NIH, plaintiff possessed clearly recognizable liberty and property interests created by federal personnel regulations and statutes.

In February, 1984, Petitioner Mackey was satisfactorily serving as Director for the National Digestive Diseases Education and Information Clearinghouse at the National Institute of Arthritis, Diabetes and Digestive and Kidney Diseases ("NIADDK") at NIH. At that time, Petitioner Mackey was GS-13, Step 9 and one of the most senior female career employees at NIADDK. Ms. Mackey started her employment with NIH in 1966 as a GS-9 after working as a bacteriologist and teaching biology.

In February, 1984, Respondent Ralph Bain was employed at NIADDK in a temporary position of special expert or consultant. Mr. Bain's appointment was due to expire on September 30, 1984, and he was advised in early 1984 that his appointment would not be renewed if Congress declined to renew the charter or appropriations for the Advisory Board for which Mr. Bain worked. Prior to coming to NIADDK, Mr. Bain had been em-

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[2] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The complaint also asserts claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 *et seq.* The district court transferred the Title VII claims to U.S. District Court in Maryland and dismissed the APA claims. These other claims are not subjects of this petition.

ployed teaching chemistry at the University of Southern Illinois.

Respondent Bain developed extensive social contacts with Earl Laurence, who was then Executive Officer of NIADDK. In February, 1984, Mr. Laurence, acting in concert with the other Respondents, embarked on a concerted course of conduct to obtain permanent, career civil service status for Mr. Bain.

In March, 1984, respondents first attempted to convert Mr. Bain from a temporary expert to permanent civil service status. On April 30, 1984, respondents Laurence and Moss were personally advised in writing by Helen Stafford, Assistant Director of Operations, Department of Personnel Management at NIH that federal law forbade the proposed conversion of Mr. Bain and that a competitive appointment was required to fill the position. *See* 5 U.S.C. § 3104; 42 U.S.C. § 289L-8 (repealed) and Chapter 304 of the Federal Personnel Manual.

Respondents then embarked on a fraudulent course of conduct designed to obtain permanent, career civil service status for Mr. Bain in violation of nondiscretionary merit selection procedures, the requirements of Chapter 304 of the Federal Personnel Manual, and Office of Personnel Management regulations which govern the conversion of special experts or consultants to permanent federal employees.

In June 1984, respondents advised Ms. Mackey that some of her principal duties, including responsibility for the program she had been successfully administering for four years, were being transferred to Respondent Bain, who would become Ms. Mackey's superior. Respondent Bain was clearly less qualified than Ms. Mackey to perform these duties.

Respondents prepared a false position description, a false vacancy announcement, and a false certification that the position had been advertised. Respondents falsely certified

that eight persons applied for the position and falsely certified that Mr. Bain was the most qualified applicant who was selected. In fact, there was no position description, no vacancy announcement, and no advertisement. Since there were no other applicants for the position, the statement that Mr. Bain was found to have been the most qualified applicant was also false. Respondents destroyed official government documents as part of the cover-up.

Petitioner Mackey timely filed complaints of discrimination and agency grievances. Respondents unlawfully refused to process grievances and through a criminal course of conduct actively and intentionally obstructed investigation of Ms. Mackey's complaints of discrimination and retaliation. Respondents repeatedly denied under oath in affidavits prepared during 1985 and 1986 that there was any cover-up or that false official government records had been prepared. Respondent Moss falsely stated in his April 1, 1985, Affidavit that respondents had complied with applicable regulations in converting Mr. Bain from an expert consultant to a federal employee. Respondents knew that these actions violated various criminal statutes. Despite repeated inquiries by NIH counselors and by official EEO investigators, respondents continued to cover up unlawful conversion of Mr. Bain and to obstruct Ms. Mackey's right to an thorough and impartial investigation and fair and prompt hearing of her clearly meritorious claims of discrimination. Respondents' actions were taken for the purpose of depriving Ms. Mackey of her right to procedural and substantive due process.

Respondents simultaneously embarked on course of conduct of retaliation and harassment which totally destroyed Ms. Mackey's hitherto promising career. In early 1985, respondents transferred Ms. Mackey to an unclassified position without a position description and carrying duties at the GS-9 level. While Ms. Mackey was assigned to a position with no career potential, respondent Bain was promoted to a career enhancing posi-

tion in the Digestive Diseases Division of NIADDK with responsibility for directing the Clearinghouse.

Five years later, on August 4, 1989, at an evidentiary hearing held before an Administrative Judge of the Equal Employment Opportunity Commission, Respondent Moss, after being subjected to extensive cross-examination, finally admitted for the first time to the preparation of false government records and false affidavits. Shortly thereafter, the instant lawsuit was filed alleging violation of Ms. Mackey's Fifth Amendment right to due process of law.

Ms. Mackey's Complaint did not consist of mere allegations of wrongdoing: Respondent Moss confessed under oath on the record at the EEOC hearing to committing these criminal actions, while acting in concert with the other respondents. The preparation and filing of these intentionally false and fabricated documents violate criminal statutes, 28 U.S.C. §§ 371, 1001, 1505 and 42 U.S.C. § 1985. This course of criminal conduct by the individual respondents is not covered by the pending complaint for violation of Title VII. The intent of respondents was to interfere with and to deprive petitioner of her constitutionally protected liberty and property interests, which were created by federal merit selection regulations, Title VII, and implementing regulations. Complaint at ¶¶ 13-19, 21-28, 31, 33.

Criminal obstruction of an investigation of a complaint of discrimination and denial of appellant's constitutionally protected rights by individual respondents are clearly separate causes of action distinct from the Title VII claims asserted against the Secretary of Health and Human Services in her official capacity. As Mr. Justice Scalia observed: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S. Ct. 2742, 2754 (1993).

Ms. Mackel has statutory entitlement to, and property and liberty rights, in, thorough and impartial investigation

of her complaints of discrimination and a right to fair and prompt hearings guaranteed by federal law and supporting regulations. 42 U.S.C. § 2000e-16; *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972); *Moore v. City of East Cleveland*, 431 U.S. 494, 501-504 (1977). The unlawful actions committed by Messrs. Laurence, Moss, Bain and Roth violated these procedural due process rights by depriving Ms. Mackey of the meaningful opportunity to present her complaint. *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

The substantive component of the Due Process clause protects individual liberty against certain government actions, regardless of the fairness of the procedures used to implement them, and is intended to protect individuals against arbitrary power of the government. *Daniels v. Williams*, 474 U.S. 327 (1986). Thus, Ms. Mackey's claim of denial of substantive due process finds clear support in the case law because respondents arbitrarily exercised their power to deprive respondent of her rights. *Davis v. Passman*, 442 U.S. 228, 234-236 (1979) (*Bivens* claim under the equal protection component of the Due Process clause of the Fifth Amendment); *Edmond v. U.S. Postal Service*, 949 F.2d 415, 420, 423 (D.C. Cir. 1991) (valid *Bivens* claim under Fourth Amendment for perjury) (citations omitted), *rehearing en banc denied*, 953 F.2d 1398 (1992); *Johnson v. Odom*, 910 F.2d 1273, 1277 (5th Cir. 1990); *Cale v. Johnson*, 861 F.2d 943, 949 (6th Cir. 1988) ("egregious abuse of government power may state a *Bivens* claim based on violation of substantive due process") (citation omitted).

At oral argument held in the District Court on January 31, 1991, respondents' counsel conceded that the Complaint states a claim for violation of Ms. Mackey's constitutionally protected Fifth Amendment due process

rights. Tr. of Hearing at 12. Notwithstanding this concession, respondents contended that they were entitled to immunity because petitioner allegedly failed to satisfy the "heightened pleading standard" the District of Columbia Circuit set forth in *Siegert v. Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991), which requires a plaintiff to submit, prior to discovery, "direct as opposed to merely circumstantial evidence of the intent." [3]

2. *The first district court decision.* On March 28, 1991, the district court dismissed with prejudice plaintiff's *Bivens* and common law tort claims against four individual defendants. The district court stated:

> B. *Failure to Meet Heightened Pleading Standard*
>
> The Supreme Court held in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that a cause of action exists against federal officials individually for violations of a person's constitutional rights while acting in an official capacity. To make such a claim, however, the plaintiff must allege a specific deprivation of his or her rights by each defendant with specific factual allegations as to each alleged deprivation. Failure to make such specific allegations deprives the Court of

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[3] Respondents also claimed they were entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Since respondents' actions were knowing violations of the law, *Briggs v. Malley*, 475 U.S. 335, 341 (1986), there is no basis for qualified immunity. The District Court never reached this issue.

Respondents further argued Ms. Mackey was not entitled to monetary damages. This argument is misplaced because the actions of which Ms. Mackey complained were not personnel actions. *Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983) (wiretapping, warrantless searches, or uncompensated takings are not "personnel actions"). Under well settled legal principles, Ms. Mackey was plainly entitled to nonmonetary relief as well. *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (*en banc*); *Hubbard v. EPA*, 949 F.2d 453, 470, 475 (D.C. Cir. 1991), *aff'd*, 982 F.2d 531 (1992) (*en banc*).

subject matter jurisdiction and requires dismissal. *See Carlson v. Green*, 446 U.S. 14, 18 (1980).

This Circuit has explained on several occasions that *Bivens* plaintiffs are held to a "heightened pleading standard" which requires plaintiffs "at the very least [to] satisfy the 'clearly established' rights they allege to have been violated with . . . precision." *Martin v. Malhoyt*, 830 F.2d 237, 253 (D.C. Cir. 1987), *quoting Smith v. Nixon*, [807] F.2d 197, 200 (D.C. Cir. 1986), and *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

The plaintiffs complaint fails to meet this heightened pleading standard since it fails to allege the deprivation of any clearly established constitutional or statutory rights. App., *infra*, 11a-12a.

The District Court further stated:

The plaintiff's complaint fails to meet this heightened pleading standard since it fails to allege the deprivation of any clearly established constitutional or statutory rights. The plaintiff alleges *nothing more than ordinary federal personnel actions* involving assignment of duties and supervisory responsibilities. There is no indication that the trivial actions complained of by the plaintiff violated clearly established constitutional rights. Therefore, the Court shall dismiss Count IV of the plaintiff's complaint for lack of subject matter jurisdiction. App., 12a. (emphasis added)

Pursuant to Fed.R.Civ. P. 59(e), Ms.Mackey sought reconsideration of this and other rulings by the District Court. After denial of this motion, App., *infra*, 16a, Petitioner timely filed a Notice of Appeal.

3. *Decisions on the first appeal.* On January 5, 1993, the Court of Appeals for the District of Columbia Circuit stated:

> ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its decision filed March 28, 1991, with respect to the dismissal of appellant's claims. Because all relevant actions occurred in Maryland and the relevant parties worked and resided in Maryland, *the district court was without jurisdiction to entertain the appellant's claims.* (emphasis added). App., *infra*, 17a.

Since the District Court lacked personal jurisdiction over the individual defendants, the panel lacked jurisdiction to reach the merits of Ms. Mackey's *Bivens* claims. Therefore, the District Court's dismissal with prejudice of Ms. Mackey's *Bivens* claims was rendered void. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2109 (1990) ("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books"); *United States v. Cummings*, 85 F.2d 273, 275 (D.C. Cir. 1936) (judgment entered without personal jurisdiction is a nullity); *Madara v. Hall*, 916 F.2d 1510, 1513-1514 n.1 (11th Cir. 1990) (vacating the dismissal on the merits).

Petitioner filed a Petition For Rehearing seeking for the first time the transfer of Ms. Mackey's *Bivens* claims to the United States District Court in Maryland, pursuant to the provisions of 28 U.S.C. § 1406(a) or, in the alternative, pursuant to 28 U.S.C. § 1404(a). *Cameron v. Thornburgh*, 983 F.2d 253, 257 (D.C. Cir. 1993).[4]

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[4] At the time Ms. Mackey filed her Petition for Rehearing and Request for Entry of Transfer Order Pursuant to 28 U.S.C. 1406(a) or § 1404(a) on February 12, 1993, the Court of Appeals' decision in *Cameron v. Thornburgh* had not yet been published. Although Ms. Mackey filed a Notice of Recent Decision on February 26, 1993, to draw *Cameron* to the attention of the Court of Appeals, the Court did not refer to *Cameron* in its decision denying the Petition for Rehearing and, indeed, there is no way to determine whether the panel in the first appeal ever saw the Notice of Recent Decision

The Petition for Rehearing was denied in a one-sentence Order that did not mention or refer in any way to plaintiff's additional request for a transfer. App., *infra*, 19a. The natural reading of this decision is a refusal by the Court of Appeals to decide the transfer issue at the appellate level.[5]

4. *The district court's decision on remand.*

On remand, Ms. Mackey moved the District Court to transfer her *Bivens* and common law tort claims to the U.S. District Court in Baltimore. Mrs. Mackey had not sought transfer of her *Bivens* claims prior to the January 5, 1993 court of appeals' order and, indeed, she could not have done so in light of the district court's dismissal of her *Bivens* claims with prejudice on March 28, 1991. Rehearing could have been denied without *necessarily* reaching the merits of the transfer issue. The district court properly concluded that the court of appeals' silence on the transfer issue in the order denying the Petition for Rehearing was not a ruling on the merits of the request to transfer claims to Maryland. The district court shared petitioner's reading of the mandate on remand, since it ruled on the merits of Ms. Mackey's transfer request, rejecting the government argument that the law of the case doctrine barred consideration of the transfer issue on the merits.[6]

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or considered whether the teachings of *Cameron* should be applied to the facts of this case.

[5] Although a federal appellate court has the power to transfer a case, usually the Court of Appeals leaves such transfer to the district court. *Koehring Co. v. Hyde Const. Co., Inc.*, 382 U.S. 362, 364 (1966), *Bolar v. Frank*, 938 F.2d 377, 379 (2d Cir. 1991) (citing cases), the usual course is to let the district court decide the transfer matter in the first instance no matter how clear cut the issue. *E.g., Afifi v. United States Dept. of Interior*, 924 F.2d 61, 64 (4th Cir. 1991).

[6] Silence in the mandate on similar issues has been interpreted as leaving the issue open for the trial court. *Perkins v. Standard Oil Co. of California*, 399 U.S. 222, 223 (1970); *Indianapolis Colts*

On July 13, 1993, the district court denied Ms. Mackey's motion to transfer, stating in part, "Because this Court has already dismissed these same claims with prejudice, the Court declines to transfer the claims to Maryland." App., *infra*, 4a. Judge Hogan's July 13, 1993, order denying transfer never mentioned the government's law of the case argument. App., *infra*, 4a.

5. *Decisions on the second appeal.*

On March 9, 1994, following a second timely filed appeal, the court of appeals issued an order granting appellee's Motion for Summary Affirmance. The court stated:

> This Court has previously considered and rejected Mackey's arguments supporting the transfer of her dismissed claims. There are no exceptional circumstances here which would warrant departure from the law of the case. *See Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 17-18 (D.C. Cir. 1980). App., *infra* 1a.

Petitioner timely filed for rehearing and rehearing *en banc*. There were no opinions accompanying the orders denying rehearing and suggestion for rehearing *en banc* issued on June 15, 1994. App., *infra*, 2a and 3a. The

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v. Baltimore, 775 F.2d 177, 180 (7th Cir. 1985) (attorney's fees); *Liberty Mut. Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir. 1982) (costs).

Because the mandate to the district court never signaled that the denial of Petitioner's rehearing petition was an actual decision on the merits of the transfer issue, it was proper for the district court to consider Ms. Mackey's transfer request on remand. *Northeastern Florida Chapter v. Jacksonville, Fla.*, 951 F.2d 1217, 1218 (11th Cir. 1992), *rev'd on other grounds*, —— U.S. ——, 113 S. Ct. 2297 (1993) (lack of standing first raised in district court on remand); *Apply v. West*, 929 F.2d 1176 (7th Cir. 1991); *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986) (mandate did not expressly address amendment to the pleadings); *Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983) (comment on merits of claim was *obiter dicta*).

court of appeals' decision herein was consistent with its April 1, 1994 ruling on the "heightened pleading standard" in denying rehearing *en banc* in *Kimberlin v. Quinlan*, 17 F.3d 1525 (D.C. Cir. 1994) (on denial of rehearing *en banc*), *pet. for cert. pending*, 63 U.S.L.W. 3009 (U.S. June 22, 1994), No. 93-2068.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND BETWEEN THE FEDERAL COURTS AND STATE COURTS OF LAST RESORT, CONCERNING THE PROPER STANDARD FOR ASSESSING QUALIFIED IMMUNITY

This Court has often noted the importance of reviewing cases that present unresolved questions of qualified immunity.[7] The decision below squarely conflicts with the logic of this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, —— U.S. ——, 113 S. Ct. 1160 (1993) and with the holdings of two courts of appeals, that "heightened pleading" standards violate the Federal Rules of Civil Procedure. It also conflicts with the holdings of four other courts of appeals, which have considered and rejected the District of Columbia Circuit's "direct evidence" pleading standard and with similar views of five Justices of this Court.

If the decision below is permitted to stand, any *Bivens* or Section 1983 case that turns on unlawful motive will be dismissed without the benefit of discovery even where the plaintiff has a confession under oath to wrongdoing from one of the defendants. Citizens whose civil and con-

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[7] *See, e.g., Butz v. Economou*, 438 U.S. at 480-481 ("Because of the importance of the immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government, we granted certiorari"). *See also Siegert v. Gilley*, 111 S. Ct. at 1793 ("We granted certiorari . . . in order to clarify the analytical structure under which a claim of qualified immunity should be addressed"); *Mitchell v. Forsyth*, 472 U.S. 511, 519 (1985); *Harlow v. Fitzgerald*, 457 U.S. at 801.

stitutional rights are thus violated stand in jeopardy of losing vital protection afforded by *Bivens* and Section 1983 actions. Equally important, assertions of qualified immunity by public officials in different parts of the country will be subject to different standards.

If Ms. Mackey does not have a *Bivens* claim under the circumstances of this case, where the falsification of documents, obstruction of a government investigation, and perjury are admitted under oath by a defendant, then no federal employee will have a *Bivens* claim. *Spagnola v. Mathis, supra* (*Bivens* claims for federal employees have not been abolished); *Hubbard v. EPA, supra.*

These are not "ordinary federal personnel actions," but are intentional criminal conduct of the individual respondents which undermines the very integrity of the congressionally enacted federal personnel system. There can be no public interest in protecting federal managerial personnel who engage in such intentional criminal conduct, particularly where one of the conspirators has confessed to committing the wrongful acts in question. The public interest here clearly lies in judicial vindication of petitioner's constitutionally protected rights. The damage to the entire federal personnel system by judicial protection of demonstrably criminal conduct by federal supervisors is enormous.

Under the facts presented here, Mrs. Mackey alleges a *prima facie Bivens* claim of violations of her right to due process for tortious and criminal interference with her constitutionally protected liberty and property interests which meets the requirements of Fed. R. Civ. P. 8 and 9. Ms. Mackey is not required to meet the "heightened pleading standard." *Leatherman* (court may not apply "heightened pleading" standard in civil rights cases alleging municipal liability under 42 U.S.C. § 1983). The *Leatherman* decision "strongly suggests that federal courts may not impose so-calied 'heightened pleading' requirements in civil rights cases." *Kimberlin* (Edwards, J.) (dissenting from denial of rehearing *en banc*), 17 F.3d at 1525, 1527. As Judge Edwards observed:

> *Leatherman*'s emphatic language seems to admit of only one reading: heightened pleading standards other than those set forth in Rule 9(b) are simply *impossible to square* with the Federal Rules of Civil Procedure and are therefore invalid.

Id. at 1528.

The petition should be granted in order to restore uniformity and certainty to the important balance between the constitutional rights of individuals and the effective functioning of government. As this Court observed in *Leatherman*, judicial "policy" favoring immunity is not a license for imposing "heightened pleading standards" contrary to Rules 8 and 9 of the Federal Rules of Civil Procedure. 113 S. Ct. at 1163 (such results "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.") Frivolous claims should be eliminated by "firm application of the Federal Rules of Civil Procedure." *Harlow*, 457 U.S. at 819, n.35 quoting *Butz v. Economou*, 438 U.S. at 508.

A. The Ruling Below Conflicts With Decisions Of Two Other Circuits Holding That "Heightened Pleading Standards" Do Not Apply To *Bivens* And Section 1983 Cases That Turn On Motive

In *Leatherman*, this Court unanimously held that heightened pleading standards are impermissible in civil rights actions against municipalities. 113 S. Ct. at 1161-63. The Court explained that: "it is impossible to square the heightened pleading standard . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163. The holding in *Leatherman* rests on the plain language of the Federal Rules, which does not create distinctions based on the subject matter of the case or the identity of the defendant.

Although the Court reserved the question of pleading standards for claims against individual officials (*id.* at 1162), the same Federal Rules that governed municipal

liability in *Leatherman* apply with equal force to *Bivens* cases. As Justice Kennedy observed with respect to the District of Columbia Circuit's pleading rule in *Siegert*: "The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56." *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring).

In conflict with the decision below, two courts of appeals have relied on *Leatherman* in applying the notice pleading provisions of Rules 8 and 9 to civil rights actions alleging individual liability.

The Seventh Circuit, in a Section 1983 action against individual defendants alleging racial discrimination, held:

> Under the Supreme Court's recent holding in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 122 L.Ed. 2d 517, 113 S. Ct. 1160, 1163 (1993), however, a heightened pleading rule does not apply to § 1983 claims. Rather, Rule 8 of the Federal Rules of Civil Procedure is applicable. Rule 8 simply requires conformity with the liberal sytem of 'notice pleading.'

Black v. Lane, 22 F.3d 1395, 1399-1400 (7th Cir. 1994). "As the Supreme Court has recently made very clear, there is no heightened pleading requirement for civil rights actions." *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734 (7th Cir. 1994) (citing *Leatherman*).

Similarly, the First Circuit recently cited *Leatherman* in an unpublished opinion assessing the adequacy of a Section 1983 complaint alleging that prison officials had fabricated disciplinary charges against a plaintiff inmate: "The standard for assessing the adequacy of a civil rights claim is whether, accepting the factual allegations in the complaint as true, and construing these facts in the light most favorable to the plaintiff, the pleading shows any fact which could entitle the plaintiff to relief." *Oropallo*

v. Parrish, No. 93-1953, 1994 U.S. App. LEXIS 9748, at *8 (1st Cir. May 5, 1994).[8]

In denying the petition for rehearing and the suggestion for rehearing *en banc*, herein, the court of appeals was following *Kimberlin* which requires *Bivens* and Section 1983 plaintiffs to satisfy its self created "heightened pleading standard." The court thus declined review on the merits and continue to apply the law at the time of the first appeal. As the *Kimberlin* majority wrote: "because the Court [in *Leatherman*] did not address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit." 6 F.3d at 789, 794 n.9. The Ninth Circuit, which had [f]ollow[ed] the lead of the District of Columbia Circuit" in adopting a heightened pleading standard, has also held that *Leatherman* does not occasion a reassessment of circuit precedent because "the Court cordoned off the question whether a heightened pleading standard might be justified in an action against an individual officer." *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir.), *cert. denied*, —— U.S. ——, 114 S. Ct. 2704 (1994). 456.[9]

The Fifth Circuit, where *Leatherman* originated, has also narrowly interpreted the mandate of the Supreme Court's decision. *Schultea v. Wood*, 27 F.3d 1112 (5th Cir. 1994). The *Schultea* Court concluded that since the Supreme Court did not "consider whether [its] qualified

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[8] Since *Oropallo* did not announced a new legal rule, publication was not warranted. *See* 1st Cir. R. 36.2(a) (publication may be foregone when the opinion, *inter alia*, does not "articulate a new rule of law."

[9] However, the Ninth Circuit has noted that "[T]he Supreme Court has . . . rejected heightened pleading standards under the Federal Rules of Civil Procedure for *almost all* claims except fraud and mistake." *Fobbs v. Holy Cross Health Sys. Corp.*, —— F.3d ——, No. 92-15852, 1994 U.S. App. LEXIS 17490 at *25 (July 19, 1994) **(emphasis added).**

immunity jurisprudence would require a heightened pleading in cases involving individual government officials," Fifth Circuit precedent holding that plaintiffs must meet such hurdle continued to provide the rule of decision. *Id.* at n.2.

Review by this Court is necessary to resolve this split between the First and Seventh Circuits, on the one hand, and the Fifth, Ninth and District of Columbia Circuits, on the other, concerning the permissibility of "heightened pleading standards" in *Bivens* and Section 1983 cases alleging individual liability.[10] The same claim that would be dismissed in some courts of appeal would proceed to trial in others. This conflict on the qualified immunity of public officials is important, recurring and plainly warrants this Court's review.

B. Review Is Warranted To Resolve A Conflict Between Federal Courts Of Appeals And State Courts Of Last Resort

The decision below also conflicts with the holdings of the highest courts in several states on the question whether a "heightened pleading standard" is permissible in cases involving qualified immunity issues. Contrary to the decision below, the District of Columbia Court of Appeals recently observed that "the Supreme Court has thrown a cloud over the continued viability of [the heightened pleading standard] even as applied to the qualified immunity

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[10] In addition many district courts have concluded that the rationale of *Leatherman* precludes a "heightened pleading standard" in *Bivens* and Section 1983 actions against individual government officials. *E.g.*, *Sapp v. Cunningham*, 847 F. Supp. 893, 900 n.9 (D. Wyo. 1994) ("*Leatherman* effectively overrules this aspect of *Sawyer v. County of Creek*, 908 F.2d 663, 665-67 (10th Cir. 1990), where the Tenth Circuit endorsed a heightened pleading requirement"); *McCallen v. Holland-Hull*, No. 93-3415, 1994 U.S. Dist. LEXIS 1364, at *3 (E.D. Pa. Jan. 27, 1994) ("the Court's analysis [in *Leatherman*], one of basic statutory construction, applies with equal force in § 1983 cases against individual defendants."

defense." *Fulwood v. Porter*, 639 A.2d 594, 597 (D.C. 1994). The disagreement between the District of Columbia Circuit and the District of Columbia Court of Appeals underscores the practical dilemma created by the decision below and emphatically reinforces the need for review. The constitutional rights of citizens and the immunities of government officials in the District of Columbia are subject to different standards depending upon the forum in which a lawsuit is filed.

The conflict is by no means limited to the District of Columbia. The highest courts in other states have applied a variety of standards for resolving claims of qualified immunity. For example, the highest court in North Dakota held: "There is no heightened pleadings standard in § 1983 civil rights actions." *Ennis v. Dasovick*, 506 N.W.2d 386, 390 (N.D. 1993). *See Point Properties, Inc. v. Anderson*, 584 So.2d 1332, 1340 (Ala. 1991) (evidence that city council members "were motivated" by improper goals must be viewed "in the light most favorable to [the Section 1983 plaintiff]"). These decisions of highest state courts demonstrate the clear national scope of a conflict that requires this Court's review.

C. The Ruling Below Conflicts With Four Other Courts Of Appeals On Whether *Bivens* Plaintiffs Are Required To Produce "Direct" Evidence Of Intent At The Pre-Discovery Stage

The district Court dismissed Ms. Mackey's Complaint because she did not meet the "heightened pleading standard" because she did not provide direct evidence of Respondents' intent in committing perjury and manufacturing documents, although she obviously presented substantial circumstantial evidence of such intent. The District of Columbia Circuit's " 'direct evidence' rule is a variation of what is often referred to as a 'heightened pleading' standard," even though the "standard" normally has nothing to do with pleadings. *Kimberlin*, 17 F.3d at 1525,

n.1, Statement of Williams, J. concurring in denial of *rehearing en banc* (citations omitted).

When viewed in terms of the requirement that Ms. Mackey provide "direct evidence" of intent, the decisions below conflict with those of four federal courts of appeals which have considered and rejected the District of Columbia Circuit's rule requiring *Bivens* and Section 1983 plaintiffs to present "direct evidence" of intent to survive dismissal on grounds of qualified immunity. The Fifth, Sixth, Seventh and Ninth Circuits have expressly held that circumstantial evidence is sufficient.[11]

The Fifth Circuit reached a similar conclusion in rejecting the direct evidence requirement employed in the District of Columbia Circuit. *Tompkins v. Vickers* 26 F.3d 603 (5th Cir. 1994). The Fifth Circuit stated that: [R]equiring direct evidence . . . effectively insulate[s] from suit public officials who deny an improper motive." *Id.* at 609.

The Sixth Circuit rejected a "direct evidence" rule in *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989). The court held that plaintiff may rely on proof "that would be strong enough to allow a jury to return a verdict for her under appropriate instructions," and stated, "it is clear that the law allows victims of race discrimination, as in other cases, to prove their cases by inferential and circumstantial proof."

The Seventh Circuit has explicitly rejected the direct evidence requirement the District of Columbia Circuit created in *Siegert*: "Although the court of appeals' opinion in *Siegert* insisted . . . that the plaintiff produce 'direct' evidence of the defendant's improper intent, we

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[11] Contrary to the District of Columbia Circuit's rule requiring *Bivens* plaintiffs to submit "direct evidence," the Federal Rules of Civil Procedure require that all facts must be viewed in the light most favorable to the non-moving party. *See Leatherman*, 113 S. Ct. at 1161; *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

agree with Justice Kennedy ['s concurring opinion in *Siegert*] that there is no principled difference between direct and circumstantial evidence." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) (citation omitted), *cert. denied*, 112 S. Ct. 1242 (1992). Requiring "direct" evidence of intent would be fatal even where the individual defendant has confessed to unlawful actions, but not his intent in committing such actions. *See id.*

Finally, the Ninth Circuit also has flatly stated that "[w]e disagree . . . with the District of Columbia Circuit that a plaintiff may only satisfy the heightened pleading standard with direct, as opposed to circumstantial evidence." *Branch v. Tunnell*, 937 F.2d 1382, 1386 (1991), *appeal after remand*, 14 F.3d 449 (9th Cir.), *cert. denied*, —— U.S. ——, 114 S. Ct. 2704 (1994).

The District of Columbia Circuit's stated resolve in *Kimberlin* to apply its admittedly flawed "direct evidence" rule until this Court adjudicates the issue 6 F.3d at 794, n.9, 798, 17 F.3d at 1585 demonstrates that this Court's intervention is needed to provide uniformity among the courts of appeals on an important and recurring issue.

D. The Ruling Below Conflicts With This Court's Holdings That Circumstantial Evidence Is Not Intrinsically Different From Direct Evidence

By erecting a pleading standard that requires *Bivens* plaintiffs to submit "direct evidence" of intent, the decision below also conflicts with this Court's holdings that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954). In some instances, circumstantial evidence "may be more certain, satisfying and persuasive than direct evidence.' " *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) (quoting *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 508 n.17 (1957)).

Requiring "direct evidence," moreover, is particularly inappropriate where, as here, state of mind is at issue. As this Court has explained with respect to cases of fraud:

> [P]roof of scienter required in fraud cases is often a matter of inference from circumstantial evidence. If anything, the difficulty of proving the defendant's state of mind supports a lower standard of proof. In any event, we have noted elsewhere that circumstantial evidence can be more than sufficient.

Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983).

In *Siegert*, the four justices who addressed the District of Columbia Circuit's direct evidence pleading rule flatly rejected it. Justice Kennedy wrote in concurrence that:

> "Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal. I would reject, however, the [D.C. Circuit] Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence." 111 S. Ct. 1789, 1795.

Similarly, Justice Marshall, joined by Justice Stevens and Justice Blackmun, perceived that the District of Columbia Circuit's direct evidence rule "effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying caim" and that there is "no warrant for such a rule as a matter of precedent or common sense." *Id.* at 1801 (Marshall, J., dissenting).[12] Such is the case here where one of the defendants below confessed to committing the unlawful actions which form the basis of Ms. Mackey's *Bivens*' claims.

In a more recent concurring opinion, Justice Kennedy, joined by Justice Scalia, recognized that circumstantial evidence may overcome a claim of qualified immunity:

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[12] The majority did not reach this issue in *Siegert*.

> [T]he question [of qualified immunity] may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred. But the question is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case.

Wyatt v. Cole, —— U.S. ——, 112 S. Ct. 1827, 1837 (1992) (Kennedy, J., concurring). Petitioner has obviously pled and proven sufficient facts to meet this standard.

The court below dismissed this action simply because the petitioner's allegations of intent were based on circumstantial evidence, notwithstanding the fact that the confession of respondent Moss is compelling and persuasive evidence in support of Ms. Mackey's *Bivens* claim. The rule of decision in this case threatens to undermine this Court's decision in *Bivens* by effectively converting an official's qualified immunity into absolute immunity, thus precluding vindication of clearly established constitutional rights for reasons that are entirely irrelevant to the merits of a claim. That result is contrary to this Court's recognition that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. at 814. *See Bivens*, 403 U.S. at 410. The extreme standard of pleading and proof applied in this case is all the more unwarranted in light of the plain deprivation of Ms. Mackey's right to procedural and substantive due process protected by the Fifth Amendment.[13]

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[13] The issue takes on even greater urgency because motive is often an essential element of violations of the due process guarantees of the Fifth Amendment, equal protection guarantees of the Fourteenth Amendment and the prohibition against cruel and unusual punishment of the Eighth Amendment. *See, e.g., Farmer v. Brennan*, —— U.S. ——, 114 S. Ct. 1970, 1979 (1994) ("To violate the Cruel and Unusual Punishment Clause, a prison official must have a 'sufficiently culpable state of mind,'" *quoting Wilson v. Seiter*, 501 U.S. 294, 297 (1991)); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988) (defendant's intent is an essential

E. Law Of The Case Does Not Bar Review

Even if the 1993 decisions of the court of appeals in the first appeal are fairly read as controlling the issue of the transfer of the *Bivens* claims against the individual respondents, the doctrine of the law of the case should not be applied here. The doctrine of the law of the case "is not an inexorable command that rigidly binds a court to its former decisions but rather is an expression of good sense and wise judicial practice." *Melong, supra*, 643 F.2d at 17 (citation omitted). "Application of the doctrine is in any event discretionary." *Halperin v. Kissinger*, 807 F.2d 180, 192 (D.C. Cir. 1986) (citation omitted).[14]

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element of a claim of sexual harassment brought under the Fifth Amendment).

[14] Where the court of appeals never reached the merits of Petitioner's request for transfer, the court of appeals was not bound by the law of the case doctrine on the second appeal. *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n.14 (D.C. Cir. 1990) (R.B. Ginsburg, J.) (questions that merely could have been decided do not become law of the case); *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 806 (D.C. Cir. 1984) (Scalia, J.) (Since transfer was not expressly addressed in the Court's Order, only if it was decided by "*necessary* implication" would the denial of transfer be the law of the case.) (emphasis added). The second appeal is not governed by the first appeal in 1993 because the court of appeals never specifically nor necessarily by implication reached the merits of whether Ms. Mackey's *Bivens* claims against the individual defendants should have been traneferred to Maryland.

Denial of the requested transfer is inconsistent with the more carefully considered holding set forth in *Cameron v. Thornburgh, supra*. The "lack of substantial analysis" of the teachings of *Cameron* in the order denying rehearing on the first appeal, App., *infra*, 19a, justifies departure from usual principles of law of the case. *Halperin v. Kissinger*, 807 F.2d at 192.

The one sentence order denying rehearing issued in this appeal stands in sharp contrast to the lengthy consideration which the court of appeals gave to the government's petition for reconsideration in *Melong*, 643 F.2d at 17-18 in the first appeal. *See* opinion on denial of petition for rehearing, *sub nom Ralpho v. Bell*, 569 F.2d 636 (D.C. Cir. 1977).

Application of the law of the case is erroneous where there has been an intervening change in the law and the district court's decision denying transfer of the *Bivens* claims is fundamentally inconsistent with *Leatherman*. Digergence from the law of the case is appropriate where the earlier decision was erroneous and where "adherence to the law of the case will work a grave injustice" by depriving Ms. Mackey of her right to procedural and substantive due process. *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 585 (D.C. Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

[Filed Mar. 9, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5277

BILLIE BRYAN MACKEY,
Appellant

v.

DONNA E. SHALALA, in her official capacity as Secretary, HHS; EARL L. LAURENCE, individually, NIH; CLIFFORD MOSS, individually, NIH; RALPH BAIN, individually, NIH; HAROLD ROTH, individually, NIH

BEFORE: Edwards, Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of the appellees' motion to dismiss or, in the alternative, for summary affirmance, the opposition thereto and the reply, it is

ORDERED that the motion for summary affirmance be granted. This court has previously considered and rejected Mackey's arguments supporting the transfer of her dismissed claims. There are no exceptional circumstances here which would warrant departure from the law of the case. *See Melong v. Micronesian Claims Comm'n,* 643 F.2d 10, 17-18 (D.C. Cir. 1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

/s/ HTA
/s/ DHG
/s/ DBS

[Filed Jun. 15, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5277

BILLIE BRYAN MACKEY,
Appellant,

v.

DONNA E. SHALALA, in her official capacity as Secretary, HHS,
Appellee.

BEFORE: Edwards, Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed April 21, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Jun. 15, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5277

BILLIE BRYAN MACKEY,
Appellant,

v.

DONNA E. SHALALA, in her official capacity
as Secretary, HHS,
Appellee.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *in banc,* that the suggestion is denied.

Per Curiam

FOR THE COURT:
RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Jul. 13, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 90-0007

BILLIE BRYAN MACKEY

v.

LOUIS W. SULLIVAN,
Defendant

ORDER

Now before the Court is the plaintiff's motion to transfer her Bivens and common law tort claims to the United States District Court for Maryland. The Court previously granted the defendant's motion to transfer the Title VII claims to Maryland and granted the defendant's motion to dismiss the remaining claims. Additionally, the Court denied the plaintiff's motion for reconsideration. The plaintiff appealed, and the Court of Appeals affirmed this Court's opinion on January 5, 1993. Because this Court has already dismissed these same claims with prejudice, the Court declines to transfer the claims to Maryland. Furthermore, even if the Court were otherwise inclined to transfer the claims, the Court finds that such transfer would not be in the interests of justice because the claims are not meritorious. Accordingly, having considered the entire record in this case, it is this 12th day of July, 1993 hereby

ORDERED that the plaintiff's motion to transfer is DENIED.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

[Filed Mar. 28, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0007

BILLIE BRYAN MACKEY,
Plaintiff

v.

LOUIS W. SULLIVAN, M.D., *et al.*,
Defendants

MEMORANDUM OPINION

Now before the Court is Defendants' Motion to Dismiss All Claims Except Those Based on Title VII or, in the Alternative, for Summary Judgment, and to Transfer Plaintiff's Title VII Claims. For the reasons stated below, the Court shall grant the defendants' motion to dismiss Counts III, IV, and V, and defendants' motion to transfer the plaintiff's remaining Title VII claims, Counts I and II, to the United States District Court for the District of Maryland.

Background of the Case

During the summer of 1980, the National Institute of Arthritis, Metabolism, and Digestive Diseases established a National Digestive Diseases Education and Information Clearinghouse ("the Clearinghouse"). The plaintiff was selected to head the Clearinghouse and was named Clearinghouse Director, a GS-13 position. Her immediate supervisor from 1980 through early 1984 was Dr. Harold

P. Roth. Earl Lawrence had certain supervisory functions over Dr. Roth.

In a February 15, 1984, memorandum, the plaintiff was notified that, effective March 1, 1984, Dr. Ralph Bain would be her direct supervisor. Sometime around February 25, 1984, Dr. Bain was designated as the Executive Director of the Clearinghouse. In June, 1984, the plaintiff was notified that Dr. Bain was assuming her responsibilities as Project Director (Project Officer) for the Clearinghouse's contract with InterAmerica Inc.

Also, sometime prior to June 1984, the plaintiff had served as the chairperson for meetings of the Advisory Committee. When the Advisory Committee met in June, Dr. Fairer served as the Chairperson.

In June or July, 1984, the plaintiff was denied approval to attend two training courses. In addition, the plaintiff was asked to submit her correspondence for review by Dr. Bain. She was also prohibited from attending a meeting for Clearinghouse Project Officers since, according to the Deputy Executive Officer of NIADDK, Dr. Bain was the Project Officer and he would be the appropriate person to attend.

In June, 1984, the plaintiff began complaining that her rights as a federal employee were being violated. Administrative hearings on the plaintiff's consolidated discrimination claims were held in 1989, and the EEOC administrative judge recommended that the agency find that no discrimination had occurred. The agency adopted the administrative judge's recommendation, and the plaintiff subsequently filed suit in this Court.

Counts I and II of the plaintiff's complaint allege violations of Title VII, 42 U.S.C. § 2000e, *et seq.* Count III alleges that the defendants' refusal to process plaintiff's grievances was arbitrary, capricious and an abuse of discretion in violation of the APA, 5 U.S.C. § 706(2)(A). Count IV alleges a *Bivens* action against the individual

defendants. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Count V asks for punitive damages for the defendants' alleged reckless, wanton and malicious conduct.

Discussion

I. *Transfer of Title VII Claims*

The Court shall first take up defendants' Motion to Transfer Plaintiff's Title VII Claims for Improper Venue. Venue in Title VII actions is governed by 42 U.S.C. § 2000e-5(f)(3) which states:

> Such an action may be brought in any judicial district in the state in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, *but if the respondent is not found within any such district,* such an action may be brought within the judicial district in which the respondent has his principal office . . . (emphasis added).

This statute preempts all other federal venue provisions that otherwise might apply. *Stebbins v. State Farm Mutual Automobile Ins. Co.,* 413 F.2d 1100 (D.C. Cir.), *cert. denied,* 369 U.S. 895 (1969).

In the case at hand, the plaintiff brings her action in the judicial district where the Department of Health and Human Services has its principal office. However, the plaintiff may *only* bring such an action if none of the other venue requirements of Title VII can be met. *See Archuleta v. Sullivan,* 725 F. Supp. 602, 604-05 (D.D.C. 1989). Since the Department of Health and Human Services can be "found" in any of the three preferred forums, insomuch as the United States Attorney may ac-

cept services in any of the three preferred forums, venue in the District of Columbia is improper.

It is clear that the three preferred forum requirements may be met by the District of Maryland. First, the allegedly unlawful employment practices—sex discrimination and harassment—took place at the National Institutes of Health ("NIH"), which is located in Bethesda, Maryland. Second, the plaintiff's employment records relevant to the unlawful employment practice are maintained at NIH in Maryland. Finally, the plaintiff always worked and continues to work for the defendant Department of Health and Human Services in the Maryland offices of NIH.

The plaintiff alleges that venue is proper in the District of Columbia since forms required to effect Dr. Bains's appointment were signed in the District. However, even if one assumes that these documents are relevant to the plaintiff's case, the existence of a document signed by someone whom the plaintiff has not claimed was aware of the alleged improprieties surrounding the appointment, is not enough to make venue proper in the District of Columbia.[1] Venue cannot lie in the District of Columbia when "a substantial part, if not all, of the employment practices challenged in this action" took place outside Washington even though actions taken in the District of Columbia "may have had an impact on plaintiff's situation." *Donnell v. National Guard Bureau*, 568 F. Supp. 93, 94 (D.D.C. 1983). The Court shall, therefore, transfer Counts I and II of the plaintiff's complaint to the District of Maryland.

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[1] The government has demonstrated, by means of affidavit, that records relevant to the allegedly unlawful practices are not located at the Department of Health and Human Services headquarters in the District of Columbia, but rather are located at NIH in Bethesda, Maryland. Plaintiff's assertions calling this affidavit into doubt are unsupported by any facts suggesting that the affidavit is false.

II. *Administrative Procedure Act Claim*

In addition to alleging a violation of Title VII, the plaintiff also alleges that defendants' actions in processing her grievances were arbitrary, capricious and not in accordance with the law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"). The Court shall dismiss this claim since there is no separate cause of action under the APA or otherwise to challenge the handling of an EEO complaint.

The only right established by Title VII is the right to be free from discrimination. *Hall v. E.E.O.C.*, 456 F. Supp. 695, 700 (N.D. Cal. 1978). Even assuming all of the plaintiff's allegations were true, the right to be free of discrimination is wholly preserved by the right to a trial *de novo*. *Id.*

> This remedy explicitly provided by Congress strongly implies that Congress did not intend that charging parties be able to force the EEOC, by means of suit or the threat thereof, to more fully or speedily investigate or attempt to conciliate their charge. Instead, a charging party dissatisfied with the EEOC may, under § 706(f)(1), circumvent the EEOC entirely and file his own suit.

Id. at 699. Therefore, the Court shall dismiss Count III of the plaintiff's complaint, alleging violations of the APA, for failure to state a claim upon which relief can be granted.

III. *Claims Against Individual Defendants*

There are several reasons this Court shall dismiss the plaintiff's claims against the individual defendants. Any one basis would serve as an adequate basis for dismissal.

A. *Lack of Personal Jurisdiction Over Individual Defendants*

None of the individual defendants reside in the District of Columbia, therefore depriving the Court of this basis for asserting jurisdiction over these defendants. As to those defendants who reside outside of the District, the Court may obtain jurisdiction over them only pursuant to the terms of the District of Columbia long-arm statute. *See* D.C. Code §§ 13-423(a)(1)-(6).

The allegations of the plaintiff's complaint do not bring the individual defendants within the scope of the D.C. long-arm statute. The complaint alleges that the individually-sued defendants, who are all residents of Maryland, made certain official personnel decisions at NIH in Maryland. The defendants did not make the decisions of which the plaintiff complains in the District of Columbia. Therefore, this cannot serve as a basis for asserting personal jurisdiction over the defendants.

Likewise, the complaint fails to allege that the plaintiff has suffered any tortious injury in the District of Columbia. The D.C. long-arm statute provides, in relevant part:

> A District of Columbia court may exercise personal jurisdiction over a person who acts directly or by agent, as to a claim for relief arising from the person's—
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, [or] engages in any other persistent course of conduct . . . in the District of Columbia.

D.C. Code § 13-423(a).

This section of the D.C. long-arm statute, too, fails to provide a basis for personal jurisdiction over the individual defendants since the plaintiff fails to allege that she has suffered tortious injury in the District of Columbia.

The plaintiff bears the burden of establishing personal jurisdiction. *See Naartex Consulting Corp. v. Watt,* 722 F.2d 779, 787 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1210 (1984). The plaintiff, here, has failed to assert facts constituting a basis for this Court to assert personal jurisdiction over the individual defendants pursuant to the D.C. long-arm statute.[2] The Court shall dismiss the claims against the individual defendants pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of jurisdiction over the individual defendants.

B. *Failure to Meet Hightened Pleading Standard*

The Supreme Court held in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), that a cause of action exists against federal officials individually for violations of a person's

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[2] Even if the plaintiff were able to bring the individual defendants within the ambit of the D.C. long-arm statute, personal jurisdiction over the defendants would not fall within the scope of due process which requires that defendants have "minimum contacts" with the forum in which the action was brought and that those actions are of such a character "that the maintenance of the suit would not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington,* 326 U.S. 310, 316 (1945) (citations omitted). This standard generally requires "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[,]" *Hanson v. Denckla,* 357 U.S. 235, 253 (1957), and some nexus between the contacts with the forum and the basis of the cause of action. *Toro Company v. Ballas Liquidating Co.,* 572 F.2d 1267, 1269 (8th Cir. 1978). The evidence before the Court, as well as the plaintiff's allegations themselves, establish that the Court's assertion of personal jurisdiction over the individual defendants in this action would offend these accepted notions of due process.

constitutional rights while acting in an official capacity. To make such a claim, however, the plaintiff must allege a specific deprivation of his or her rights by each defendant with specific factual allegations as to each alleged deprivation. Failure to make such specific allegations deprives the Court of subject matter jurisdiction and requires dismissal. *See Carlson v. Green,* 446 U.S. 14, 18 (1980).

This Circuit has explained on several occasions that *Bivens* plaintiffs are held to a "heightened pleading standard" which requires plaintiffs "at the very least [to] specify the 'clearly established' rights they allege to have been violated with . . . precision." *Martin v. Malhoyt,* 830 F.2d 237, 253 (D.C. Cir. 1987), *quoting Smith v. Nixon,* 706 F.2d 197, 200 (D.C. Cir. 1986) and *Hobson v. Wilson,* 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985).

The plaintiff's complaint fails to meet this heightened pleading standard since it fails to allege the deprivation of any clearly established constitutional or statutory rights. The plaintiff alleges nothing more than ordinary federal personnel actions involving assignments of duties and supervisory responsibilities. There is no indication that the trivial actions complained of by the plaintiff violated clearly established constitutional rights. Therefore, the Court shall dismiss Count IV of the plaintiff's complaint for lack of subject matter jurisdiction.

C. *Recovery of Money Damages*

The plaintiff cannot maintain a civil action for money damages, including punitive damages, since Congress has already provided a means by which the propriety of certain adverse personnel actions can be reviewed. This Congressionally-approved remedy is exclusive. *See Bush v. Lucas,* 462 U.S. 367 (1983).

In *Bush,* the Supreme Court found that the Civil Service Reform Act represented a system of "comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *Id.* at 368. The existence of the Act, therefore, a "special factor counselling hesitation" in creating a *Bivens* remedy. *Id.* at 389-90, citing *Bivens,* 403 U.S. at 397. This is true despite the fact that the Act did not provide complete relief to the plaintiff:

> Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service.

Id. at 389.

This Circuit has reaffirmed the principle that the inadequacy of the remedy afforded by the statute does not warrant a court-ordered remedy under *Bivens. See Spagnola v. Mathis* and *Hubbard v. U.S. Environmental Protection Agency,* 859 F.2d 223 (D.C. Cir. 1988).

In both *Spagnola* and *Hubbard,* the plaintiffs sought *Bivens* relief because the Civil Service Reform Act afforded no damages remedy. Despite the absence of an opportunity for financial compensation for the alleged loss of job or promotion, and despite the absence of an available administrative remedy to test their allegations of infringement of their constitutional rights, the Court of Appeals held that no *Bivens* remedy should be implied. This reasoning extends to the plaintiff's claims of discrimination, as well. *See Brown v. General Services Administration,* 425 U.S. 820 (1976).

With this in mind, the Court finds yet another basis for dismissal of the plaintiff's *Bivens* claims, Counts IV and V of the complaint, for failure to state a claim upon which relief may be granted.

Conclusion

For the reasons set forth above, the Court shall transfer the plaintiff's Title VII claims, Counts I and II, to the District of Maryland, and dismiss Counts III, IV and V pursuant to Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure.

Date: 28 March 1991

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

[Filed Mar. 28, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0007

BILLIE BRYAN MACKEY,
Plaintiff

v.

LOUIS W. SULLIVAN, M.D., *et al.*,
Defendants

ORDER

In accordance with the Memorandum Opinion issued in the above-captioned case on March 28, 1991, it is this 28th day of March, 1991, hereby

ORDERED that

(1) Plaintiff's Title VII claims, Counts I and II, shall be transferred to the District of Maryland;

(2) Counts III, IV and V of the plaintiff's complaint shall be dismissed with prejudice.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

[Filed Jan. 31, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-0007

BILLIE BRYAN MACKEY,
Plaintiff

v.

LOUIS W. SULLIVAN, M.D., *et al.*,
Defendants

ORDER

On March 28, 1991, the Court granted the defendants' motion to dismiss Counts III, IV, and V, and the defendants' motion to transfer the plaintiff's remaining Title VII claims, Counts I and II, to the United States District Court for the District of Maryland. Shortly thereafter, the plaintiff filed a motion for reconsideration pursuant to Rule 59(e).

Having reviewed the pleadings submitted by both parties and the entire record in this case, and having found no new argument that merits vacating or amending the March 28, 1991 Opinion and Order, the Court shall deny the motion for reconsideration. Accordingly, it is this 31st day of January, 1992, hereby ORDERED that

plaintiff's motion for reconsideration is hereby DENIED.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

[Filed Jan. 5, 1993]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 92-5063

BILLIE BRYAN MACKEY,
Appellant

v.

LOUIS W. SULLIVAN, M.D.,
Secretary of HHS, *et al.*

BEFORE: Silberman, Buckley and Henderson, Circuit Judges

ORDER

Upon consideration of the motion to dismiss in part and for summary affirmance, the opposition thereto and the reply, it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its decision filed March 28, 1991, with respect to the dismissal of the appellant's claims. Because all relevant actions occurred in Maryland and the relevant parties worked and resided in Maryland, the district court was without jurisdiction to entertain the appellant's claims. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the appeal from the district court's order transferring the remainder of the complaint be construed as a petition for writ of mandamus. *See In re Sosa*, 712 F.2d 1479, 1480 (D.C. Cir. 1983) (per curiam) (transfer decisions reviewed by petition for writ of mandamus). It is

FURTHER ORDERED that the petition for writ of mandamus be denied. A writ of mandamus will issue to block a transfer only upon a showing that the district court grossly abused its discretion. *In re Tripati*, 836 F.2d 1406, 1407 (D.C. Cir. 1988) (per curiam). Mackey has made no such showing here. As mentioned earlier, Mackey and the appellees are employed in Maryland, the events alleged in the complaint occurred primarily in Maryland, and proof of the allegations will involve evidence and witnesses located in Maryland. Accordingly, the Maryland district court is the proper forum for Mackey's claims.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

/s/ LHS
/s/ JLB
/s/ KLH

[Filed May 19, 1993]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5063

BILLIE BRYAN MACKEY,
Appellant

v.

LOUIS W. SULLIVAN, M.D.,
SECRETARY OF HHS, *et al.*

BEFORE: Buckley, Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed February 12, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

RON GAVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

RULES INVOLVED

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 9. Pleading Special Matters

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall for asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further

pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Supreme Court, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

No. 94-441

In the Supreme Court of the United States

OCTOBER TERM, 1994

BILLIE BRYAN MACKEY, PETITIONER

v.

CLIFFORD MOSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

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QUESTION PRESENTED

Whether the court of appeals erred in summarily affirming the district court's refusal to transfer petitioner's due process claims under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), where the court of appeals in a prior appeal had refused to transfer the same claims, and no review of that order was sought in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-441

BILLIE BRYAN MACKEY, PETITIONER

v.

CLIFFORD MOSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals granting summary affirmance (Pet. App. 1a), and the opinion of the district court (Pet. App. 4a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1994. A petition for rehearing was denied on June 15, 1994. Pet. App. 2a. The petition for a writ of certiorari was filed on September 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, Billie Bryan Mackey, was employed at the National Institutes of Health (NIH). Her petition arises out of litigation in which she raised three interrelated sets of claims: (1) Title VII claims of sex discrimination and retaliation; (2) Administrative Procedure Act claims of arbitrary refusal to process grievances relating to the appointment of and assignment of duties to another employee in the job she sought; and (3) *Bivens* due process claims alleging deprivation of liberty and property interests relating to employment. Only the *Bivens* claims are at issue in the petition.

1. In 1980, petitioner was selected to serve as Director of the National Digestive Diseases Education and Information Clearinghouse (the Clearinghouse) of the NIH's National Institute of Arthritis, Diabetes and Digestive and Kidney Diseases (NIADDK). Respondent Dr. Harold Roth acted as petitioner's supervisor, and respondent Earl Lawrence had certain supervisory responsibility over Roth. In 1984, respondent Dr. Ralph Bain, who had been employed at NIADDK as a temporary consultant, was appointed to the permanent civil service position of Executive Director of the Clearinghouse. Pet. App. 5a-6a.

Petitioner contends that Bain's appointment violated civil service laws requiring a competitive application process. Pet. 4-7. As Executive Director, Bain acted as petitioner's direct supervisor. Pet. App. 6a. Petitioner asserts that some of her duties were reassigned to Bain, who was "clearly less qualified" than she to perform those duties, Pet. 5, and that she was later transferred to a lower grade position. Pet. 6.

Beginning in June, 1984, petitioner filed ten administrative complaints, alleging that the personnel actions

of her supervisors were unlawful. She also filed an administrative charge of employment discrimination. The EEOC hearing showed that respondents failed in some respects to comply with civil service laws in the permanent appointment of Bain. 8/4/89 Tr. 359. In 1989, after the hearing, the EEOC administrative judge recommended finding that there was no discrimination. The agency adopted that recommendation.

Petitioner asserts that respondents' actions deprived her of a due process "right to a[] thorough and impartial investigation and fair and prompt hearing" of her discrimination claims. Pet. 6; see Pet. 7-8. In view of the EEOC administrative evidentiary hearing, including the airing of the civil service irregularities, the precise nature of the asserted due process violation is unclear.

2. In 1990, petitioner filed a civil action in the United States District Court for the District of Columbia. Petitioner's complaint asserted claims against the agency under Title VII, 42 U.S.C. 2000e-16; claims against the agency under the Administrative Procedure Act, 5 U.S.C. 706; and *Bivens* claims against respondents in their individual capacities. See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). She sought backpay and compensatory and punitive damages. Pet. App. 6a-7a.

Respondents moved to transfer the Title VII claims to the District of Maryland. The district court granted the motion, holding that venue in the District of Columbia was improper under the special Title VII venue provision, 42 U.S.C. 2000e-5(f)(3). Under that provision, venue is proper where the allegedly unlawful conduct took place, where the employment records are maintained, or where the position at issue was located. Maryland is the only proper venue under those tests. Pet. App. 7a-8a.

The district court granted the respondents' motion to dismiss the remaining claims. The court dismissed the APA claim because it restated the cause of action set out in the Title VII claim. The court held that "there is no separate cause of action under the APA or otherwise to challenge the handling of an EEO complaint." Pet. App. 9a.

The court dismissed the *Bivens* claims with prejudice on three independent grounds, concluding that "[a]ny one basis would serve as an adequate basis for dismissal." Pet. App. 9a. First, the court held that there was no personal jurisdiction over the individual defendants in the District of Columbia. *Id.* at 10a-11a. Second, the court found that the complaint failed "to allege the deprivation of any clearly established constitutional or statutory right" that would support a *Bivens* action. Pet. App. 12a. Third, the court ruled that, under *Bush* v. *Lucas*, 462 U.S. 367 (1983), the *Bivens* claims were precluded by the comprehensive remedial scheme established by Congress in the Civil Service Reform Act. Pet. App. 12a-13a.

3. Petitioner appealed the district court's ruling to the District of Columbia Circuit. The court of appeals summarily affirmed in an unpublished, two-page *per curiam* order. The court stated that "[b]ecause all relevant actions occurred in Maryland and the relevant parties worked and resided in Maryland, the district court was without jurisdiction to entertain the appellants' claims." Pet. App. 17a. The merits of the parties' positions were "so clear as to warrant summary action." *Ibid.* The court also affirmed the transfer of the Title VII claims to Maryland. *Id.* at 18a.

Petitioner filed a "Petition for Rehearing and Request for Entry of Transfer Order," seeking, among other things, an order directing the district court to transfer

the *Bivens* claims to the District of Maryland. The court denied the petition. Pet. App. 19a.

4. Petitioner then moved in the district court to transfer the *Bivens* claims to the District of Maryland. The court denied the motion, explaining that "this [c]ourt has already dismissed these same claims with prejudice." Pet. App. 4a. The court further held that "transfer would not be in the interests of justice because the claims are not meritorious." *Ibid.*

5. Petitioner again appealed to the District of Columbia Circuit. The court of appeals granted respondents' motion for summary affirmance. In an unpublished one-page order, the court held that it had, in the prior appeal, already rejected petitioner's arguments in favor of the proposed transfer. The court stated that "[t]here are no exceptional circumstances here which would warrant departure from the law of the case." Pet. App. 1a.

Petitioner sought rehearing and rehearing *en banc*. The rehearing petition was denied, Pet. App. 2a, as was the suggestion for rehearing *en banc*. *Id.* at 3a.

ARGUMENT

Petitioner contends that a writ of certiorari is warranted in order to resolve a circuit conflict regarding whether heightened standards of pleading apply to *Bivens* claims where qualified immunity is raised as a defense. Pet. 14-24. Specifically, petitioner challenges the District of Columbia Circuit's "direct evidence" test. Pet. 14.* The heightened pleading and "direct eivdence" issues are not, however, presented in this case.

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* That issue is raised by the pending certiorari petition in *Kimberlin* v. *Quinlan*, No. 93-2068. On October 3, 1994, this Court invited the Solicitor General to submit the views of the United

1. The district court dismissed petitioner's *Bivens* claims with prejudice on three independent grounds, none of which pertains to the circuit conflict asserted in the petition. Because resolution of the conflict thus could not change the disposition of the case, a writ of certiorari would be inappropriate.

a. The district court's holding that it lacked personal jurisdiction over the individual defendants in the District of Columbia was alone an adequate basis for that court's rejection of petitioners *Bivens* claims. Pet. App. 10a-11a. That ruling was summarily affirmed, and is not contested here. The personal jurisdiction ruling supports the judgment on grounds unrelated to the asserted circuit conflict.

b. The district court also held that petitioner's *Bivens* claims were precluded under *Bush* v. *Lucas*, 462 U.S. 367 (1983), in light of the comprehensive remedial scheme established by the Civil Service Reform Act. Pet. App. 12a-13a. In *Bush*, this Court held that because the Civil Service Reform Act includes "comprehensive procedural and substantive provisions" regarding claims arising out of the federal employment relationship and provides "meaningful remedies against the United States, * * * it would be inappropriate for us to supplement that regulatory scheme" with a constitutional *Bivens* action against the individual federal officials. 462 U.S. at 368, 390. See also *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988) (reaffirming *Bush*). That holding, too, is dispositive, and petitioner does not contest it here.

c. The district court, under the heading "Failure to Meet Heightened Pleading Standard," held in the

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States regarding the issue presented in that petition, and the Solicitor General is in the process of preparing a response.

alternative that the complaint failed to state a *Bivens* claim. Although the heading refers to a heightened pleading standard, the court actually held that petitioner failed to "allege the deprivation of any clearly established constitutional or statutory right." Pet. App. 11a-12a. The court reasoned:

> The [petitioner] alleges nothing more than ordinary federal personnel actions involving assignments of duties and supervisory responsibilities. There is no indication that the trivial actions complained of by the [petitioner] violated clearly established constitutional rights.

Id. at 12a. The decision thus does not implicate a heightened pleading standard. Rather, the court effectively held, as did this Court in *Siegert* v. *Gilley*, 500 U.S. 226, 227 (1991), that "petitioner's claim failed at an analytically earlier stage of the inquiry into qualified immunity: [her] allegations, even if accepted as true, did not state a claim for violation of any rights secured to [her] under the United States Constitution." Petitioner's *Bivens* claims were not dismissed because they were pleaded with insufficient specificity, but because, at the threshold, she failed to "assert[] a violation of a constitutional right at all." *Id.* at 232.

2. The petition for a writ of certiorari should also be denied because the court of appeals' decision of which review is sought did not address the merits of the district court's initial decision, so the question petitioner raises is not presented. The only issue presented by the court of appeals' decision is whether the court erred in applying the law of the case, as reflected in its prior order, to affirm the district court's decision not to transfer the *Bivens* claims (Pet. App. 1a). That

issue is not raised in the petition, and in any event would not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-441

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BILLIE BRYAN MACKEY,
Petitioner,

v.

CLIFFORD MOSS, EARL L. LAURENCE, HAROLD ROTH and RALPH BAIN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

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REPLY BRIEF

Respondents do not address the merits of the important issues raised by Ms. Mackey and argue, instead, that the "heightened pleading standard" and "direct evidence" issues are not presented in this case. This argument is inconsistent with the record herein. We note that on October 3, 1994, the Court requested the Solicitor General to state the position of the United States on these same issues in *Kimberlin v. Quinlan*, 17 F.3d 1525 (D.C. Cir. 1994) (on denial of rehearing *en banc*), *pet. for cert. pending*, 63 U.S.L.W. 3009 (U.S. June 22, 1994), No. 93-2068.

1. Respondents assert that the "court of appeals in a prior appeal had refused to transfer the same claims." There is no record support for this contention. The court of appeals denied Ms. Mackey's Petition for Rehearing

without giving any indication whether it was rejecting Ms. Mackey's request for transfer on the merits or was following the normal practice of leaving the transfer issue to the district court. The "heightened pleading standard" and "direct evidence" issues are squarely raised in the courts below and properly before this Court. If the district court improperly applied the D.C. Circuit's "heightened pleading standard" in its analysis of Ms. Mackey's Fifth Amendment *Bivens* claims, then it is obvious that the District Court's dismissal of the claims with prejudice must be reversed.

Although this Court had unquestioned jurisdiction to consider a Petition for *Certiorari* following the first appeal, there is no rule of law requiring that the petition be filed at that time. Indeed, under the circumstances present here, where the issue of transfer was left open to be decided by the District Court on remand, a grant of *certiorari* would be inconsistent with the decisions of this Court. A litigant may wait until the case is over, then appeal from the final judgment and raise on that appeal the validity of any previous orders than have not become moot in the interim. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 353, 365 n. 1 (1973); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("law of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review.") (citation omitted); *Mercer v. Theriot*, 377 U.S. 152, 153-154 (1964) (considering issues raised in first appeal on second petition for certiorari after denying certiorari following the first appeal); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"). *See Brotherhood of Locomotive Fireman v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967), denying *certiorari* "because the Court of Appeals remanded the case, [and thus] it is not yet ripe for review by this Court." *See also Estelle v. Gamble*, 429 U.S. 97,

115 (1976) (Stevens, J. dissenting), referring to the Court's "normal practice of denying interlocutory review."

2. The Opposition is in error because it omits the crucial fact that the court of appeals summarily affirmed the dismissal of Ms. Mackey's *Bivens* claims only on the grounds of lack of personal jurisdiction. The district court obviously could not dismiss the *Bivens* claims with prejudice if the district court lacked personal jurisdiction; yet the dismissal with prejudice prevents petitioner from litigating the important Constitutional issues in any other jurisdiction. Since the court of appeals never reached the merits of Ms. Mackey's *Bivens* claims during the first appeal, its decision operated as a dismissal without prejudice of the *Bivens* claims.

3. The Opposition argues that the trial judge simply did not mean what he said when he used the language "heightened pleading standard." The government is reduced to arguing what it claims "the court *effectively held*," Opp. at 7 (emphasis added), rather than what the district court actually said. *See* Pet. App. at 11a-12a.

The district court captioned its dismissal of Ms. Mackey's claim as: "B. *Failure to Meet Heightened Pleading Standard.*" Pet. App. at 11a. The district court analyzed Ms. Mackey's claims in terms of her claimed failure to meet this standard and, in fact, the district court used the expression "heightened pleading standard" three times within two pages of its decision. It is thus clear that Ms. Mackey's *Bivens* "specific factual allegations" were adjudged to be legally insufficient under Rule 12 only because they were measured against the "heightened pleading standard." Petitioner's claims were dismissed with prejudice because the District Court believed that plaintiff failed to satisfy the "heightened pleading standard" of the District of Columbia Circuit.

The holding that Ms. Mackey failed to allege the deprivation of any clearly established constitutional or statutory rights is grounded, of course, in the "heightened

pleading standard" analysis.* Pet. App. at 11a-12a. Only when measured against the "heightened pleading standard," do Ms. Mackey's claims, which are grounded in the admitted violation of criminal statutes, falsification of government documents, obstruction of a government investigation, and perjury admitted under oath by government defendant for the purpose of depriving plaintiff of her constitutional rights, become "*nothing more than ordinary federal personnel actions.*"

4. The District Court's analysis of the *Bivens* claims as "*nothing more than ordinary federal personnel actions*" obviously affected its analysis of the availability of money damages. The *Bivens* claims, based on admitted violation of criminal statutes, the falsification of documents, obstruction of a government investigation, and perjury under oath are distinct from Title VII claims.

5. The Opposition concedes violations of the civil service laws and does not dispute the admitted violation of criminal statutes, falsification of documents, obstruction of a government investigation, and perjury. There is, however, no remedy for such violations under Title VII. As Mr. Justice Scalia observed: "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S. Ct. 2742, 2754 (1993).

6. The only reasonable interpretation of the district court's 1993 refusal to transfer the *Bivens* claims is that the court relied on its 1991 analysis dismissing the same claims on the merits. In the 1991 analysis, the district court plainly relied on the "heightened pleading standard," using that term three times in its opinion. The court stated: "Because this Court has already dismissed these same claims with prejudice, the Court declines to transfer the claims to Maryland." Pet. App. at 4a. If the "height-

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*** Counsel for respondents conceded that Ms. Mackey's Complaint stated a *Bivens* claim for violation of Petitioner's Fifth Amendment due process rights. *See* Petition at 8-9.**

ened pleading standard" is erroneous, then Ms. Mackey is entitled to have her pleadings [and her request for transfer pursuant to 28 U.S.C. § 1404 or § 1406] measured against the correct legal standard used to determine whether such pleadings are meritorious.

The Opposition claims the existence of independent grounds for denying the petition because the district court held Ms. Mackey's *Bivens* claims were precluded under *Bush v. Lucas*, 462 U.S. 367 (1983). Although *Bush* precludes monetary damages for federal employment claims, the teachings of *Bush* do not bar Ms. Mackey's claims arising out of the admitted violation of criminal statutes, falsification of documents, obstruction of a government investigation, and perjury, which are clearly separate and distinct from "*ordinary federal personnel actions.*" *Id.* at 385 n.28 (wiretapping, warrantless searches, or uncompensated takings are not "personnel actions"). Since the admitted violation of criminal statutes, falsification of documents, obstruction of a government investigation, and perjury, are clearly not "*ordinary federal personnel actions,*" it follows that the District Court's analysis of *Bush* does not constitute independent grounds for denying Ms. Mackey's claims.

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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